No. 44.

Reply Br. of Lewis & Co.

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PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

REPLY BRIEF OF APPELLANTS.

JAS. HAMILTON LEWIS,
Attorney for Appellants.

(18,044.)

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The answering brief of defendant in error clings to the single hope drawn from the alleged "order" of the Commissioner of the General Land Office of November 1, 1873.

In the words of Polonius to Hamlet—

"Still harping on my daughter."

Now, this order is conclusively answered by reference to the order and the law.

I.

By the granting act to the Northern Pacific railroad (section 3) the provision is that "there is granted to the Northern Pacific railroad * * * land free, etc., * * * *at*

the time the *line* of the said road is *definitely fixed*" (*i. e.*, by filing map of definite location).

Then the Secretary may designate the selections, etc.

By section 6 it is the survey *only* to follow general route. The odd sections then to be not subject to entry, etc., all *as may* be required by *the construction of said* road.

Let it be noted that these withdrawals permitted by section 6 are depending on the necessity caused by the actual construction. It is the process of construction that *alone* calls for such withdrawal.

Therefore there can be no construction—" as fast," etc., or otherwise—except on the line of definite location. The location of the definite route must have been decided on and accepted before *construction* could begin or the Government know where *construction* is to be undertaken. So such withdrawals can only be in contemplation of a map of *definite* location having been filed.

Therefore the order of the Commissioner making withdrawals upon the filing of the *general route*, when the law is that such could only be done upon filing *definite location*, conveys nothing, is without jurisdiction, is wanting in jurisdictional premise, is a void thing against rights properly attaching.

If a court should order property released from attachment upon filing bond, properly approved, and the clerk should order the property released before such filing of bond and the approval of the same, will any one contend successfully that a process of execution upon an inferior judgment could attach to the property in precedence to the first attachment because of such improper and non-jurisdictional release by the administrative officer of the court—the clerk? Preposterous!

II.

We insist that the wisdom of the Sanders case (166 U. S.), is justified by the object of the law and is peculiarly fitting to the facts of the case at bar.

III.

Counsel for defendant in error seek to avoid the benefits to appellant arising from his settlement and residence by claiming that the record is silent—bare—fails to show for what purpose Nelson settled on the land. Counsel for company is in error. The record has failed to impress him with its recitals.

1st. The presumption of the purpose to acquire a homestead will be indulged.

Tarpey *vs.* Madsen, 178 U. S., 215.

2d. The answer of appellants' (defendants in lower court) affirmative defense, paragraph I, "that he (Nelson) held and (from said date) still holds and occupies said lands under and by virtue of the homestead laws of the United States, and is entitled to * * * peaceful possession."

Transcript, page 3.

See also paragraph IX and X, statement of case.

Transcript, page 8.

See finding and opinion of judge of superior court (Transcript, page 14), finding purpose of settlement to acquire a homestead.

Also see page 15, Transcript, finding to the same effect, paragraph I.

IV.

The answer is attempted to be made to the contended-for effect of the acts of 1887 (page 17, opening brief of appellants) and act 1898 (page 18, brief of appellants).

With reference to the main brief of appellants, this is most respectfully submitted.

JAS. HAMILTON LEWIS,
Attorney for Appellants.